

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20296 of 2010

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Bihar State Text Book Publishing Corporation, a Corporation incorporated under the Company Act, 1956 having its office at Budh Marg, P.S.Kotwali, Distt., Patna, through its Registrar Cum Secretary Basant Kumar S/O Shri Satrugan Prasad Kunwar R/O Budh Marg, P.S.Kotwali, Distt.-Patna.

... .. Petitioner/s

Versus

1. The Commissioner of Income Tax-I, Patna, having its office at Central Revenue Building, Birchand Patel Marg, Patna-800001.
2. Asst. Commissioner Of Income Tax, Circle-2, Having Its Office At Central Revenue Building (Annexe), Birchand Patel Marg, Patna-800001.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.D.V.Pathy, Advocate.
For the Respondent/s : Mrs. Archana Sinha, Advocate.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 04-09-2020

The sole issue arising consideration in the present proceedings is as to whether the petitioner is entitled to exemption in terms of Sections 10 sub Section 23C(iiiab) of the Income Tax Act or not.

Certain facts are not in dispute. The petitioner, namely, Bihar State Text Book Publishing Corporation, incorporated under the Companies Act, 1956, is wholly owned by the Government of Bihar and as such is an instrumentality of the State. It undertakes activities of printing, publishing and distribution of textbooks under the State. Before this Court it is



also not in dispute that the petitioner was incorporated solely for educational purpose. Also, it is wholly or substantially financed by the Government. However, whether it generates profit or is established to generate profit, needs to be examined.

It is also not in dispute that petitioner received a notice dated 28.1.2010 (Annexure-1) issued under Section 148 of Income Tax Act, 1961 (hereinafter referred to be as 'the Act'), by the Assistant Commissioner of Income Tax, Circle-2, Patna, informing his reasons to believe that income assessable is chargeable to tax for the assessment year 2006-07 and as to why it be not so done. Petitioner assailed the said notice by filing the instant petition on 30.11.2010 and vide interim order dated 21.12.2010, this Court, directed the Revenue not to take any coercive action pursuant to any order of re-assessment which may be passed in such proceedings.

It is a matter of record that pending consideration of the present petition, assessment proceedings were concluded with the passing of assessment order dated 23.12.2010 by Additional Commissioner of Income Tax, Range-2, Patna, (Annexure-10) which is placed on record vide separate application. As is evident from the said order, the petitioner received subsidy @ 50% on the general sales amounting to Rs.8



crore 43 lakh (approximately). Hence the Assessing Officer determined the Income chargeable to tax amounting to be Rs.7,66,06450/-.

We notice, the impugned order of assessment running into five pages. However, the Assessing Officer not dealt with anyone of the contentions raised on behalf of the petitioner or assigned any reason for not applying the ratio of law laid down in several judicial decisions, particulars of which, stand referred to in paragraphs 3, 4, 6, 7 and 8 of the order itself.

In fact, we find the order to be cryptic, assigning the only reason of belief of the assessee receiving subsidy on general sales under the programme termed as “Sarva Shiksha Abhiyan”, sufficient enough to reassess the scheme. This undisputedly is under a programme undertaken pursuant to and under a policy decision of the Government and not any private individual.

To begin with, Ms Archana Sinha, learned counsel for the Revenue, with vehemence, argued that petitioner had got an alternative remedy of filing an appeal under the provisions of the Act and as such, must take recourse to such remedy. Not finding favour with such submission, we called upon the learned counsel for the parties to argue the matter on merits. For at such



a belated stage, we are not inclined, more so when the order of assessment stands passed during the pendency of the instant proceeding, to relegate the parties for exhausting alternative remedy, particularly as would unfurl from our discussions hereinafter, the impugned action is totally in violation of the statutory provisions and judicial pronouncements.

On merits, opposing the petition, Ms Archana Sinha lays much emphasis on the most recent decision on the issue rendered by Hon'ble Apex Court in **(2016) 12 SCC 258 titled as Visvesvaraya Technological University Vs. Assistant Commissioner of Income Tax**. Otherwise, she could not point out as to how the petitioner was not fulfilling any one of the conditions prescribed under the Act. On the other hand, in support of his submission, Sri D.V.Pathy, learned counsel for the petitioner, while assailing the impugned order submitted that the issue in question is no longer res integra, as stands squarely settled not only by this Court vide judgment dated 1.4.2011 rendered in M.A. No. 425 of 2010 titled as *Bihar State Text Book Publishing Corporation Vs. The Commissioner of Income Tax-I, Patna* but also by Hon'ble Apex Court in a case titled as **Assam State Text Book Production and Publication Corporation Limited Vs. Commissioner of Income Tax**



[(2009)XVII SCC 391].

At this stage, we may take note of the statutory provisions which we are called upon to examine with its applicability to the attending facts and circumstances. It stands extracted hereinbelow :

"Income not included in total Income.

10. In computing the total Income of a previous year of any person, any income falling within any of the following clauses shall not be included.....

.....(23C) any income received by any person on behalf of.....

.....(iiiab) any university or other educational institution existing solely for educational purposes and not for purposes of profit, and which is wholly or substantially financed by the Government.”

The said provision was introduced with effect from 1.4.1999 with the enactment of the Finance (No.2) Act, 2019.

Prior to it, the statutory provision read differently and the Hon’ble Apex Court in **(2015) 8 SCC 47 titled as Queen’s Educational Society Vs. Commissioner of Income Tax** examined the legislative history with the object sought to be achieved, necessitating subsequent enactment. Reference of the legislative development is only in the context of the submission made by Ms Archana Sinha emphasizing the



significance and value which must prevail upon the Court, in interpreting the object and purpose of the subsequent enactment.

Section 10 of the Act stipulates that while computing total Income from the previous year of any person, if any income falls within any one of the clauses specified therein, the same shall not be included as an income for the purposes of computation. One of the defined clauses allowing such expansion, with which we are concerned, stands reproduced (supra):

The ingredients, *sine qua non* for making such a clause of exemption applicable are (a) the person must be a University/other educational institution; (b) existing solely for educational purpose, “and” (c) not for the purposes of profit; “and” (d) must be wholly or substantially financed by the Government.

The Hon’ble Apex Court in *Visvesvaraya* case (supra) while taking note of its earlier decisions rendered in *Queen’s Educational Society* (supra) has already observed that if a surplus of Revenue accrued is applied for educational purposes, then the educational institution can be said to functioning solely for educational purpose and not for the purposes of profit. Also, the earlier principle enunciated in



Queen's Educational Society stands reiterated in the following terms :

“6. The relevant principles of law which will govern the first issue i.e. whether an educational institution or a university, as may be, exists only for educational purpose and not for profit are no longer res integra, having been dealt with by a long line of decisions of this Court which have been elaborately noticed and extracted in a recent pronouncement i.e. *Queen's Educational Society vs. Commissioner of Income Tax* (2015) 8 SCC 47). The principles that emanate from the views expressed by this Court are set out in paragraph 11 in *Queen's Educational Society* (supra), which are extracted below:

“11. Thus, the law common to Section 10(23C) (iiiad) and (vi) may be summed up as follows:

(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on “for profit”. No inference arises that



merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.”

7. To the above principles, one further test as laid down in CIT vs. Surat Art Silk Cloth Manufacturers' Assn. (1980) 2 SCC 31)and culled out in American Hotel and Lodging Association Educational Institute vs. Central Board of Direct Taxes and Others (2008 (10) SCC 509)may be added which is as follows:

“In order to ascertain whether the institute is carried on with the object of making profit or not it is the duty of the prescribed authority to ascertain whether the balance of income is applied wholly and exclusively to the objects for which the applicant is established.” (Paragraph 37)

8. The above principle has been specifically reiterated in paragraph 19 of the decision in Queen's Educational Society (supra) in the following terms:



“The final conclusion that if a surplus is made by an educational society and ploughed back to construct its own premises would fall out of Section 10(23-C) is to ignore the language of the section and to ignore the tests laid down in Surat Art Silk Cloth case [CIT v. Surat Art Silk Cloth Manufacturers' Assn.(1980) 2 SCC 31], Aditanar case [Aditanar Educational Institution v. CIT [(1997) 3 SCC 346] and American Hotel & Lodging case [American Hotel & Lodging Assn. Educational Institute v. CBDT [(2008) 10 SCC 509]. It is clear that when a surplus is ploughed back for educational purposes, the educational institution exists solely for educational purposes and not for purposes of profit.”

9. In the present case, we find that during a short period of a decade i.e. from the year 1999 to 2010 the appellant University had generated a surplus of about Rs.500 crores. There is no doubt that the huge surplus has been collected/accumulated by realizing fees under different heads in consonance with the powers vested in the University under Section 23 of the VTU Act. The difference between the fees collected and the actual expenditure incurred for the purposes for which fees were collected is significant. In fact the expenditure incurred represents only a minuscule part of the fees collected. No remission, rebate or concession in the amount of fees charged under the different heads for the next Academic Year(s) had been



granted to the students. The surplus generated is far in excess of what has been held by this Court to be permissible (6 to 15%) in Islamic Academy of Education and another vs. State of Karnataka though the percentage of surplus in Islamic Academy of Education (supra) was in the context of the determination of the reasonable fees to be charged by private educational bodies.”

It is not in dispute that petitioner stands established for educational purpose. It is also not in dispute that it is wholly and substantially financed by the Government. Applying the ratio laid down in *Queen's Educational Society* (supra), it also cannot be said that the purpose and object of the petitioner is not to carry on the activity of education; established primarily for educational purpose; and that, the purpose and object is not profit making.

Judicial notice can be taken on the fact that in the State of Bihar, petitioner Corporation is distributing books free of cost to children studying in various Government schools.

This Court, in *Bihar State Text Book Publishing Corporation* (supra), with respect to the very same petitioner, under identical circumstances, quashed and set aside the order passed by the Revenue, as confirmed by the Tribunal. We fail to understand as to why the Assessing Officer ignored such fact, by



not taking cognizance thereof, particularly when attention whereof was invited. Equally we fail to understand as to why the Revenue persisted in opposing the instant petition and not withdraw its action, particularly when the said view of this Court was to their knowledge; never assailed; and attained finality.

In the said decision, this Court also examined the legislative development, i.e., repealing of the existing Sections 10(22) and introducing a new provision, i.e., Section 10(23C(iiiab)). It held that the instant petitioner was carrying on the activity which squarely fell within the definition of Section 10(15) of the Act (charitable purpose) and was dependent upon the finance of the State. The Court was concerned with the factual matrix where gross receipts from different sources received by the petitioner exceeded more than a crore but since the organization was carrying out such activity, which fell wholly and squarely within the ambit and scope, fulfilling all the essential ingredients stipulated under Section 22 of the Act, action of the Revenue in initiating proceedings for assessment of Income untenable in law. In fact, the Court answered the following four questions in favour of the petitioner:

“(i) Whether the Tribunal was correct in law in holding that the amount of Rs.8,23,15,167/-



being the amount of subsidy receivable on sale of text books though not received either by the end of the final year or till date, could be brought to tax as Income under the scheme of the Act?

(ii) Whether the Tribunal was in error in applying the ratio of the judgment of the Hon'ble Supreme Court in *Sahni Steel Case* (supra) which is distinguishable on facts?

(iii) Whether the Tribunal was in error in holding that the subsidy receivable from the State Government of Bihar on sale of text books was taxable on mercantile system of accounting without any appropriate consideration of the fact that such subsidy not having been received was not real Income and, therefore, not liable to tax?

(iv) Whether the Tribunal erred in considering the fact that even otherwise sale of text book was an educational activity exempt from tax?"

And while doing so it took note of an earlier decision rendered by Hon'ble Apex Court in *Assam State Text Book* (supra).

We find favour with the submission made by Sri Pathy, that following observations in *Assam State Text Book* (supra), more so on facts and law, as is evident from paragraphs 6, 9 and 10 of the said report, to be squarely applicable to the instant case.

"6. On going through the records, we find that the High Court has not taken into account the prior



history of the case, particularly in the context of incorporation of the Corporation under the Companies Act, 1956, as a government company. Initially, as stated above, the assessee was a State-controlled Committee and Board, which were attached to the office of the Director of Public Instruction, State of Assam. It is only in the year 1972, that the government company got constituted under Section 617 of the Companies Act, 1956. That, prior to 1972, the entire funding for the working of the Committee/Board was done by the State of Assam and that even the ownership of the assets remained vested in the State of Assam and that even the ownership of the assets remained vested in the State of Assam which stood transferred to the Corporation in 1972, when it got incorporated under the Companies Act, 1956.

9. The operative part of the Rajasthan High Court's judgment reads as under: (ITR p.669)

“It is not disputed before us that the aims and objects of the Tamil Nadu Textbook Society and those of the respondent assessee are almost identical. It is also not shown to us that the surplus amount, if any, of the respondent assessee, is used for any other purpose or distributed to other members. The Commissioner of Income Tax (Appeals) as well as the Tribunal have noticed that even if some amount remains surplus, that is utilized only for the purposes of education. Thus, having regard to the concurrent findings of fact recorded by the Commissioner of Income Tax (Appeals) and the Tribunal and also taking note of the letter of the Central Board of Direct Taxes itself, it is not possible for us



to say that the order of the Tribunal is erroneous in any way. In this way, no question of law arises for consideration much less a substantial question of law.”

10. Following the judgment of the Rajasthan High Court, we are of the view that, in this case, the High Court, in its impugned judgment, has not considered the historical background in which the Corporation came to be constituted; secondly, the High Court ought to have considered the source of funding, the shareholding pattern and aspects, such as return on investment; thirdly, it has not considered the letters issued by the CBDT which are referred to in the judgment of the Rajasthan High Court granting benefit of exemption to various boards/societies in the country under Section 10(22) of the Act; fourthly, it has failed to consider the judgments mentioned hereinabove; and lastly, it has failed to consider the letter of the Central Government dated 9.7.1973, to the effect that all State-controlled educational committee(s)/board(s) have been constituted to implement the educational policy of the State(s); consequently, they should be treated as educational institution.” (emphasis supplied)

Coming to the decision on which Ms Archana Shahi vehemently relies upon, we notice that in *Visvesvaraya* case (supra) on facts the Court found the petitioner therein, not to be fulfilling the essential ingredients mandatorily required entitling applicability of the exemption clause. In fact, the Court reiterated its earlier view in *Queen's Education Society* case



(supra). It found the University established by the Government of Karnataka to be financed neither wholly nor substantially by the Government. Nor was it dependent upon it for finance. The finance of the University from the Government was only to the extent of 1% and profit from the relevant year was surplus to the extent of 500 crores, which also was not ploughed back for any activity for which the University was set up; fulfilled its object; or fees of the students reduced. Also, profits generated were far more than the permissible limits (6 to 15%) as laid down by in **Islamic Academy of Education Vs. State of Karnataka [(2003) 6 SCC 697]**. It is under these circumstances; the Court held that the mandate of the law of securing contributions from the Government source and not fees collected under the statute to be Income not generated from the sources of finance of the Government.

For all the reasons above, we agree with the submission made by Sri Pathy that the impugned action is not only misconceived but wholly unsustainable and untenable in law.

As such we quash the notice dated 28.1.2010 (Annexure-1) issued by Assistant Commissioner of Income Tax, Circle-2, Patna as also consequential order dated 23.12.2010



(Annexure-10) passed by Additional Commissioner of Income Tax, Range-2, Patna.

The writ petition stands allowed.

No order as to costs.

Interlocutory application, if any, stands disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

sujit/-

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Transmission Date	

